Appeal No: 24-11764

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

TESSA G.,
PLAINTIFF-APPELLANT,

v.

XAVIER BECERRA,
Secretary, United States Department of
Health and Human Services,
DEFENDANT-APPELLEE.

REPLY BRIEF OF PLAINTIFF-APPELLANT TESSA G.

On Interlocutory Appeal of an order from the United States District Court
for the Northern District of Georgia.
Case No. 1:23-cv-02665-LMM-RGV

Respectfully Submitted,

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, Plaintiff-Appellant Tessa G. certifies that the following persons and entities may have an interest in the outcome of this appeal:

1. Au, Janei (former counsel for Plaintiff during EEOC appeal process)
2. Bagenstos, Samuel R. (General Counsel, U.S. Department of Health and Human Services)
3. Becerra, Xavier (Secretary, U.S. Department of Health and Human Services)
4. Ben-David, Neeli (counsel for Defendant)
5. Buchanan, Ryan K. (U.S. Attorney for Northern District of Georgia)
6. Cohen, Mandy (Director, Centers for Disease Control and Prevention)
7. D'Agostino, Debra (former counsel for Plaintiff during EEOC appeal process)
8. Eichenholz, Keith (counsel for Defendant)
9. Epilepsy Foundation of America
10. G., Tessa, Plaintiff-Appellant (pseudononymous)
11. Garland, Merrick B., Attorney General of the United States
12. Gillis-Gilbertz, Pamela S. (former president, AFGE local union 2883)
13. May, Hon. Leigh Martin, United States District Court Judge
14. Mendel, Gabriel (counsel for Defendant-Appellee)

15. Penn, Matthew (Responsible Management Official of Defendant-Appellee)

16. United States Attorney's Office, Northern District of Georgia

17. United States Department of Health and Human Services, Defendant-Appellee

18. United States Department of Justice

19. United States Equal Employment Opportunity Commission

20. Vineyard, Hon. Russell G, United States Magistrate Judge

21. Williams, Melaine (counsel for Defendant)

No publicly traded company or corporation has an interest in the outcome of this appeal.

/s/ [redacted] a/k/a Tessa G.

Plaintiff-Appellant, *Pro Se*

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INTRODUCTION AND OVERVIEW OF ARGUMENT

The presumption of openness in litigation is significant, however, Plaintiff has demonstrated that her privacy interests in preserving the confidentiality of her epilepsy diagnosis from public disclosure in this case are even more substantial. The district court abused its discretion and did not apply the correct legal standard when it not only failed to *actually* consider *all* the specific circumstances of this case. Instead of using the six factors this court set forth in Plaintiff B. v. Francis 631 F.3d 1310 (11th Cir. 2011) as a starting point for considering *all* the circumstances of the case, the court limited its assessment to those six factors.

In particular, the court failed to assess the implications not only of Plaintiff losing the anonymity she had throughout the litigation of the Complaint through the EEOC's appellate decision directly preceding the district court filing; but it also disregarded that proceeding in her name and thereby publicly disclosing her epilepsy online would subject Plaintiff to additional severe harm similar to the type of harm she seeks to redress by continuing her Complaint in district court.

The court below furthermore failed to *actually* consider *all* the circumstances of this case when it gave "short shrift" to the widely-established severe epilepsy stigma, beginning with the Magistrate Judge chalking up the stigma to "embarrassment, then the court implying the stigma of epilepsy is not

sufficiently severe because epilepsy is a "common medical condition." Defendant's reiteration of this in its brief only reinforced the district court's error.

The court further abused its discretion and misapplied this Court's legal standard when, instead of basing its determination of anonymity on the actual evidence of the stigma attached to epilepsy, it justified such denial because Plaintiff did not cite a prior case specifically finding that one's epilepsy is information of "utmost intimacy"—even though that very question in this case appears to be of first impression.

Contrary to Defendant's contention, Plaintiff did not waive specific arguments on appeal by not making them precisely below. Since first moving to proceed anonymously in this case, Plaintiff has set forth her substantial privacy interests in this case outweigh the presumption of openness in litigation of Federal Rule of Civil Procedure 10(a). This Court should reverse the district court's denial of anonymity.

ARGUMENT

Preliminary points

a. Defendant did not respond to Plaintiff's objection to the Magistrate Judge's denial of anonymity despite full opportunity to.

While Defendant in its brief urges this Court to uphold the district court's denial of anonymity to Plaintiff, Defendant never filed a response to Plaintiff's objection to the Magistrate Judge's denial of anonymity below (DKT 5). Defendant could have raised the arguments it set forth in its appellate brief ("D's brief") with the court below but declined to. This was despite Defendant having full opportunity, after being served, to file a response months before the court overruled Plaintiff's objection (DKT 26). As Plaintiff noted in her opening brief (7-8), Defendant told Plaintiff on November 15, 2023 that, "We do not take a position regarding your request [to proceed anonymously]." Despite not filing a response to Plaintiff's objection (DKT 5) and thereby not opposing Plaintiff's anonymity request, Defendant urged this Court to uphold the denial of anonymity after the district court did not dismiss Plaintiff's case.[1]

b. Plaintiff did not waive arguments on appeal by not making those precise arguments before the district court.

Defendant's assertion throughout its brief that Plaintiff waived "the ability to

[1] It dismissed three of the five claims in Plaintiff's Complaint, but maintained those claims Plaintiff litigated before the EEOC. *See* DKTS 1, 15, 32 and 40.

argue" precise arguments and/or cite further cases not specifically put forth before the district court reflects a misunderstanding of the law. *See* Brief of Appellee Xavier Becerra (hereinafter "D's Brief") at 11, 19, 24. As the Supreme Court stated, "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." Yee v. Escondido**,** 503 U.S. 519, 534 (1992) (*noting* because petitioners raised a constitutional takings claim below, they are not making a separate claim on appeal in presenting alternative arguments as to why the challenged ordinance constitutes a taking in different ways.)

As this Court has clarified, "[T]here is a difference between raising new issues and making new arguments on appeal." In re Home Depot Inc., 931 F. 3d 1065, 1086 (11th Cir. 2019). "Parties can most assuredly waive positions and issues on appeal, but not *individual* arguments—let alone authorities." Sec'y v. Robert N. Preston, TPP Holdings, Inc., 873 F.3d 877, 883 n.5 (11th Cir. 2017) (*emphasis added*). Plaintiff has not raised new issues or claims on appeal; rather, she has clarified specific arguments and factors to elucidate why her privacy interests in this case outweigh the presumption of openness in litigation.

Plaintiff's principal claim in her motion to proceed anonymously (DKT 2) is that her privacy interests, especially maintaining the confidentiality of her epilepsy diagnosis, outweigh the strong presumption of openness in litigation. Both in her

initial motion to proceed anonymously then her objection to the Magistrate Judge's denial of anonymity, Plaintiff made her underlying position clear. All Plaintiff's particular arguments support her main position. Plaintiff did not waive more particularized arguments simply because she did not make them as precisely before the district court. *Compare* P's opening brief with DKTS 2 and 5.

I. PLAINTIFF'S PRIVACY INTEREST IN MAINTAINING THE CONFIDENTIALITY OF HER EPILEPSY DIAGNOSIS OUTWEIGHS THE STRONG PRESUMPTION OF OPENNESS IN LITIGATION.

When denying Plaintiff's motion to proceed anonymously, the court did not actually consider the true severity of epilepsy stigma; Plaintiff's constitutional and statutory right to maintain the privacy of her epilepsy diagnosis; *or* the *totality* of the circumstances of this Complaint that *together* warrant anonymity. In its brief, Defendant misconstrues the issues and/or the errors made by the district court when it denied Plaintiff anonymity.

A. Defendant misconstrues the underlying privacy interest at issue in asserting that redacting or sealing documents would resolve Plaintiff's privacy concerns regarding public disclosure of her epilepsy diagnosis.

Defendant asserted that, "Given that Plaintiff has already redacted her name and the court has sealed certain pleadings, her argument that anonymity is warranted due to the impossibility of concealing her epilepsy diagnosis from public

disclosure fails." D's brief at 17. However, the limited redactions and sealing of documents in this case thus far—of Plaintiff's name and/or PII—have been *in furtherance of* maintaining her anonymity. It is obvious if Plaintiff's name were disclosed in this case, her epilepsy diagnosis would inevitably become public information attached to her name. Moreover, such redactions and/or sealing of documents—principally the ROI that Defendant submitted via ECF (Doc. 16-2)—contains extensive personal information about Plaintiff and other individuals that federal agencies cannot disclose without consent under the Privacy Act.[2] *See, e.g.,* Speaker v. HHS, 623 F.3d 1371 (11th Cir. 2010).

That (limited) redactions and/or sealing of documents has been necessary to maintain Plaintiff's confidentiality to date and/or for Defendant to comply with the Privacy Act does not negate Plaintiff's need to maintain anonymity to prevent public disclosure of her epilepsy in connection with her name.

Defendant's assertion that anonymity is unnecessary because some (limited) redactions and/or sealing of documents has been applied repeats one of the Magistrate Judge's errors in denying Plaintiff's anonymity motion: the suggestion that Plaintiff's privacy concerns could be alleviated through sealing or redaction.

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[2] ***NOTE*:** Before Defendant moved to seal the ROI submitted via ECF, Doc 16-2, Plaintiff had proposed to Defendant full redactions—of her name and PII—throughout the ROI filing. But *Defendant* preferred to file it under seal than make sufficient redactions throughout that large file (of Plaintiff's information and that of others) to comply with the Privacy Act.

See DKT 4 at 12. The Magistrate Judge, and in turn Defendant, erred in citing a case that is *not* similar to Plaintiff's: in the other case, the disclosure of plaintiff's specific health information was *potential*—not unavoidable—absent anonymity. *See* D's brief at 16-17 and DKT 4, *citing* L.R. v. Cigna Health & Life Ins. Co., 6:22-cv-1819-RBD-DCI, at *4 (M.D. Fla. July 13, 2023). Indeed, in L.R. v. Cigna, which involved a claim of insurance benefit denials for *an unspecified* mental health condition, that court emphasized disclosure of that plaintiff's mental health diagnosis was *not inevitable*—such information could *thus* alternatively be redacted or sealed to protect that plaintiff's specific health information. Id.

L.R. v. Cigna is *not* analogous to the instant case. Plaintiff's epilepsy is a *specific* disability central to this Complaint. It was *the very disclosure of* her epilepsy that gave rise to this Complaint. *See* DKT 1 at 15-17; 23; and 42. The circumstances following Plaintiff's epilepsy disclosure—including repeated comments and discussion by Agency managers and staff concerning her epilepsy—are fundamental facts for demonstrating discriminatory animus and/or pretext in this case. *See* e.g., DKT 22-1 at 27, 38-41.[3] Unlike the "general mental health diagnosis," in L.R. v. Cigna, Plaintiff's epilepsy specifically is central to this

[3] ***NOTE***: DKT 22-1 is the brief supporting Plaintiff's default judgment motion that Plaintiff had submitted to the EEOC, setting forth Plaintiff's claims of discriminatory termination and retaliation, including some evidence of animus toward her epilepsy and pretext—based on which EEOC held Defendant liable for discrimination and retaliation.

Complaint such that hypothetically removing references to it to conceal her epilepsy diagnosis from her identity would significantly undermine key parts of her discrimination case.[4] Id. The confidentiality of Plaintiff's epilepsy in this case is not comparable to the benefits denial claim concerning *an unspecified* mental health condition, where *possible* disclosure of such "[I]formation can be alternatively sealed, redacted, or subjected to a protective order" to prevent disclosure. L.R. v. Cigna, Id. at 9-11.

That the Magistrate Judge cited L.R. v. Cigna as analogous to the instant case further reflects the court did *not* ***actually*** consider the circumstances of *this* Complaint when denying Plaintiff's motion to proceed anonymously. Id.

Defendant's reliance on L.R. v. Cigna reinforces the Magistrate Judge's error, and misconstrues the underlying privacy issue. Id. (citations omitted).

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[4]***NOTE***: In Defendant's (duplicate) submission of EEOC OFO's decision to this Court, in Defendant's Supplemental App'x at DKT. 16-3, it was ***Defendant***—*not* EEOC— that redacted reference to Plaintiff's epilepsy in that copy of EEOC's decision. It is unclear why Defendant filed this duplicate copy of EEOC's decision redacting "epilepsy" under seal, given EEOC publicly published the decision redacting Plaintiff's name and PII.

The public version of EEOC's decision redacted *only* 1) Plaintiff's name, replacing it with the pseudonym "Tessa G." and 2) her city/state of residence (EEOC decision at 7, App'x p. 54).

EEOC appellate decisions are publicly published on EEOC's website and in legal databases such as Westlaw. The version of EEOC's decision Plaintiff attached to her Complaint (DKT 1 at 41-53, Plaintiff App'x at 48-60) is identical to EEOC's public version.

B. Plaintiff's epilepsy diagnosis is information of the 'utmost intimacy' because the privacy of such health information is both constitutionally and statutorily embedded.

Defendant's brief (at 15-16) overlooked that *this* Court has acknowledged, "In *Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977), the Supreme Court recognized a constitutional interest 'in avoiding disclosure of personal matters.'" Burns v. Warden, USP Beaumont 482 F. App'x 414, 417 (11th Cir. 2012). As another circuit clarified, "The constitutionally protected privacy interest in avoiding disclosure of personal matters clearly encompasses medical information and its confidentiality." Norman-Bloodsaw v. Lawrence Berkeley Laboratory, 135 F. 3d 1260 (9th Cir. 1998), *citing* Whalen v. Roe, 429 U. S. 589 (1977). Yet other circuits have recognized "medical concerns" to be information of "utmost intimacy" and/or "sensitive and highly personal" that may warrant anonymity alongside issues of sexual activities, reproductive rights, and bodily autonomy. *See* Doe v. MIT, 46 F.4th 61 66 (1st Cir., 2022), *citing* In re Sealed Case, 971 F.3d 324, 327 (D.C. Cir. 2020).

Balancing the right to privacy of one's health information against the presumption of openness in litigation is especially important given the privacy interest in one's health information is not only also constitutionally embedded, like the public's access to judicial proceedings. Individuals' right to the privacy of their

health information is additionally protected directly and/or in principle by several statutes. HIPAA,[5] the Rehabilitation Act, the Americans with Disabilities Act, the Privacy Act and Freedom of Information Act all contain provisions protecting personal information including, directly and/or indirectly, health information.

C. Requiring Plaintiff to publicly disclose her epilepsy under her name would contravene the ADA's intent to prevent employers from accessing applicants' medical information before making employment decisions, which Defendant disregarded.

In its brief, Defendant sidestepped Plaintiff's argument (opening brief at 24-25) that compelling public disclosure of her epilepsy would contravene the ADA's intent to restrict pre-employment access to applicants' medical information, particularly concerning "hidden disabilities." As this Court stated:

> In enacting § 12112(d), Congress sought to prevent employers from using pre-employment medical inquiries "to exclude applicants with disabilities — particularly those with so-called hidden disabilities such as epilepsy, diabetes, emotional illness, heart disease, and cancer-before their ability to perform the job was even evaluated." H.R. Rep. No. 101-485, pt. 2, at 1. The legislative history of § 12112(d)(2) indicates that "Congress wished to curtail all questioning **that would serve to identify and exclude** persons with disabilities from consideration for employment by drafting [§ 12112(d)]." *Griffin*, 160 F.3d at 594. Allowing non-disabled applicants to sue will enhance and enforce Congress's prohibition. Moreover, a contrary reading would vitiate § 12112(d)(2)'s effectiveness: "It makes little sense to require an [applicant] to demonstrate that he has a disability to prevent his

[5] Health Insurance Portability and Accountability Act, 42 U.S.C. § 1320d–6.

NOTE: While HIPAA is not directly applicable to the instant Complaint, because Defendant is not a covered healthcare entity, it is the broader principle of individuals' right to health privacy underlying HIPAA's Privacy Rule that is generally applicable.

> [potential] employer from inquiring as to whether or not he has [one]." *Griffin*, 160 F.3d at 594 (internal quotation and citation omitted).

Harrison v. Benchmark Elec. Huntsville, 593 F.3d 1206, 1213-14 (11th Cir. 2010), *citing* Griffin v. Steeltek, Inc., 160 F.3d 591 (10th Cir. 1998) (**emphasis added**).

Similarly, it makes little sense to compel a plaintiff to publicly disclose a hidden (and sensitive) disability for all prospective employers to forever see, as a requirement to redress the discrimination and severe harm that followed *the very disclosure of that* disability to her last employer. *See* DKT 1 at 42, *noting*, "The AJ also found that Complainant established a prima facie case of discrimination due to her disability when, *shortly after she informed her supervisor…of her epilepsy*, he hired someone to replace Complainant..." Tessa G. v. HHS, EEOC Appeal No 2020004613 (Aug. 29, 2022) at 2 (*emphasis added*).

This Court's Harrison decision was a basis for another court extending anonymity due to a plaintiff's HIV:

> More compelling to the Court is Plaintiff's argument that requiring disclosure of his identity would also make his HIV-positive status readily available to potential future employers, in contravention of the ADA's restriction on employers' pre-offer access to an applicant's health information.

Doe v. Metro. Gov't of Nashville, No. 3:23-CV-00736, 2023 WL 6211372 at 5 (M.D.TN Sep. 25, 2023), *citing* Harrison, Id.

In Harrison, this Court implicitly recognized that, under the ADA, individuals have a substantial right to withhold her epilepsy diagnosis from

prospective employers. Id. That privacy interest is not merely a concern about "livelihood" and/or "embarrassment," as the court below characterized it. *See* DKT 4 at 8. Indeed, the choice to disclose one's epilepsy to employers (or anyone else) is an important decision to be made on a situation-to-situation basis, with *the very choice to disclose it* to employers statutorily protected.[6] Compelling public disclosure of Plaintiff's epilepsy by way of publishing her name in this Complaint would *permanently* eliminate Plaintiff's statutorily-protected choice of whether and/or when to disclose her epilepsy to employers.

Based on the aforementioned constitutional- and statutory-based right to maintain the privacy of such confidential health information, Plaintiff's epilepsy diagnosis is information of the "utmost intimacy."[7] Plaintiff's privacy right to maintain the confidentiality of her epilepsy from public disclosure—especially in redressing injury caused by the government—is at least as firmly embedded in federal statute and the Constitution as the public's constitutional- and statutory-based right to access judicial proceedings. *See* Plaintiff's Opening Brief at 15-16.

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[6] *See,* U.S. Equal Employment Opportunity Commission, "Epilepsy in the Workplace and the ADA," May 15, 2013, *available at*: https://www.eeoc.gov/laws/guidance/epilepsy-workplace-and-ada

[7] ***NOTE***: This Court's decision in Doe v. Frank, 951 F.2d 320 (11th Cir. 1992) was issued almost two decades before Harrison (2010). As Plaintiff noted in her objection to the Magistrate Judge's denial of anonymity (DKT 5 at 13, note 25), Doe v. Frank was moreover decided several years before common search engines became widely available to the public, which have since made court cases and medical information contained therein instantly available to prospective employers and nearly anyone online. Id.

D. The stigma of epilepsy is sufficiently severe it separately justifies anonymity to prevent public disclosure of Plaintiff's epilepsy diagnosis

As Plaintiff noted in her opening brief, the primary reason for requesting anonymity, beyond her broader right to maintain the privacy of her medical diagnosis, is the widely recognized *severe* stigma still attached to epilepsy. *See* P's Opening Brief at 20-24; DKT 2 at 2; and DKT 5. Epilepsy remains among *the most* stigmatized diseases, as copiously set forth through legal authorities and empirical evidence.[8] *See* DKT 5. Plaintiff set forth she has faced severe consequences following her epilepsy disclosure not just to Defendant in this case, but previously throughout her life as well. DKT 2 at 2; DKT 5 at 8. This goes far beyond, as the Magistrate Judge and Defendant chalked it up, "embarrassment" and/or concern about "livelihood." *See* D's brief at 4 and DKT 4 at 8.

The numerous sources Plaintiff cited establishing the severe, persistent stigma surrounding epilepsy included the Supreme Court's acknowledgement of epilepsy stigma, particularly an unfounded fear of the condition, in School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 284 (1987). She also cited Congressional testimony of a top disability rights attorney, Arlene Mayerson,

[8] *See*, e.g., Jerome Engel, *Epilepsy in the world today: medical point of view*. 43 EPILEPSIA, Suppl 6:12-3 (2002). doi: 10.1046/j.1528-1157.43.s.6.6.x. PMID: 12190969 (*noting* epilepsy is "[O]ne of the oldest and *most stigmatized* of human medical conditions") (*emphasis added*).

leading to passage of the ADA, that epilepsy stigma is *even worse* than (severe) mental illness—so much "that personnel directors would prefer to hire a former prison inmate or mental hospital patient than an epileptic."[9] The current General Counsel for Defendant HHS Secretary,[10] Samuel Bagenstos, himself (previously) acknowledged Mayerson's testimony on the severity of epilepsy stigma. Id, DKT 5. More recently, as the Legal Director of the Epilepsy Foundation of America, Alison Nichol, stated in a 2020 story about another epilepsy discrimination case, "The stigma and discrimination faced by people with epilepsy is *much worse* than a lot of other disabilities"[11] (*emphasis added*).

The district court and Defendant stressed the aforementioned are not controlling authorities specifically on whether epilepsy stigma warrants anonymity. However, given this particular question appears to be of first impression,[12] these

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[9] Samuel Bagenstos, *Subordination, Stigma, and "Disability*," 86 VA. L. REV. 397, 471, 502 (2000), *citing* Americans with Disabilities Act: Hearing Before the House Committee on Small Business, 101st Cong. 126–39 (1990) statement of Arlene Mayerson) (collecting studies); H.R. Rep. No. 101-485, pt. 2, at 71 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 353.

[10] As of the date of this brief.

[11] David Wildstein, New Jersey Globe, "Newspaper pulls job offer after learning woman had epilepsy, lawsuit alleges," Jan. 30, 2020 available at: https://newjerseyglobe.com/judiciary/newspaper-pulls-job-offer/ (accessed Aug. 1, 2024)

[12] ***NOTE***: However, as Plaintiff cited in her opening brief, courts have granted anonymity to plaintiffs whose disability discrimination cases center around epilepsy, without analyzing privacy or stigma factors–much like this Court permitted anonymity to a plaintiff with HIV without directly analyzing such. *See* e.g., Doe v. Mylan Pharms, Inc, 2017 U.S. Dist. LEXIS 47820 (N.D.W.V. Mar. 30, 2017).

are persuasive legal authorities and empirical sources the court should consider absent directly controlling authorities. These authorities include empirical findings *directly* comparing the stigma surrounding epilepsy to that of HIV,[13] and *even worse than* serious mental illness,[14] respectively. *See* DKT 5.

Absent controlling caselaw on whether epilepsy is information of "utmost intimacy," this Court's cases permitting anonymity in lawsuits regarding HIV (Doe v. DeKalb Cnty Sch. Dist., 145 F.3d 1441, 11th Cir. 1998) and/or mental illness per Doe v. Frank, 951 F.2d 320 (11th Cir. 1992),[15] are consistent with recognizing one's epilepsy as information of "utmost intimacy." Particularly when these cases are coupled with the aforementioned persuasive authorities. If the stigma of *one of the most* historically stigmatized diseases (epilepsy)[16] is insufficient to warrant anonymity, what stigma is?

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[13] ***See***, e.g., Paula Fernandes et al, *Prejudice towards chronic diseases: Comparison among epilepsy, AIDS and diabetes*, 16 SEIZURE (2007) at 320 (*finding* median prejudice score on a scale of 0-10 for the three conditions, was, respectively, 9 for HIV/AIDS, 7 for epilepsy, and 2.5 for diabetes).

[14] ***See*** Americans with Disabilities Act: Hearing Before the House Comm. on Small Business, 101st Cong., 2d Sess. 128-134 (1990) (testimony of Arlene Mayerson); S. Bagenstos, *Supra* note 9.

[15] ***See*** supra notes 9, 13, 14.

[16] ***See*** Fernandes et al, *supra* note 13; S. Kaculini, et al. *The History of Epilepsy: From Ancient Mystery to Modern Misconception*, Cureus 13(3), March 17, 2021. *Available at*: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC805194.

i. Though Defendant repeatedly emphasized the district court's reference to epilepsy being a "common medical condition," the prevalence of epilepsy—significantly lower than most "common" conditions—does not negate the severe and persistent stigma attached to it.

The district court's reference to epilepsy as a "common medical condition"—without citing any sources—exhibits another way in which the court did not *actually* engage with the circumstances of this case. In turn, Defendant's repeated reference to "[E]pilepsy, a 'common medical condition'" (D's brief at ii, iii, 7, 15, 17, 18, and 27) is unavailing. Referring to epilepsy as a "common medical condition" does not negate the widely-documented severe epilepsy stigma—comparable to HIV and *at least as stigmatized* as (serious) mental illness. Both the district court's and Defendant's characterizations of epilepsy as a "common medical condition" lacked any context.

For some context, the prevalence of epilepsy is roughly one percent of the U.S. population (approximately three million people).[17] By comparison, the prevalence of HIV is below one percent of the U.S. population (roughly 1.2 million people).[18] By contrast, *close to a quarter* of U.S. adults—23 percent—has "any

[17] Centers for Disease Control and Prevention, *Epilepsy Facts and Stats*, May 15, 2024, available at: https://www.cdc.gov/epilepsy/data-research/facts-stats/index.html

[18] Centers for Disease Control and Prevention, *HIV Surveillance Supplemental Report: Estimated HIV Incidence and Prevalence in the United States, 2018–2022*, May 15, 2024, available at: https://stacks.cdc.gov/view/cdc/156513

mental illness,"[19] with roughly six percent *serious* mental illness.[20] Epilepsy is thus significantly less common (prevalent) than (general) mental illness. Its prevalence is even lower than "serious mental illness,"[21] but closer to that of HIV. (However, it is despite not because of the close prevalence of epilepsy to HIV—both near one percent—that experts have regarded the stigma of the two as comparable.[22])

Defendant's repeated characterization of epilepsy as a "common" medical condition simply does not negate the severe stigma attached to it. But the district court's reference to epilepsy being "a common medical condition"—without any citations or context—further demonstrates the court gave "short shrift" to the actual nature and history of *severe* stigma surrounding epilepsy. This error is further evident from the court's inapt comparison of the well-established, centuries-old stigma surrounding epilepsy to that of ADHD, when it further justified denying anonymity below by citing a case involving ADHD, In re Doe v. Univ. of Miami, U.S. Dist. LEXIS 200135 (2012). *Compare* DKTS 4, 5 and 26.

Giving "short shrift" to the nature and severity of epilepsy stigma is another

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[19] *Mental Illness,* National Institute of Mental Health, https://www.nimh.nih.gov/health/statistics/mental-illness.shtml, accessed Nov. 10, 2024.

[20] Id.

[21] ***Except*** schizophrenia, the prevalence of which is estimated at below one percent. *See* National Institute of Mental Health, *Mental Health Statistics*—Schizophrenia, available at: https://www.nimh.nih.gov/health/statistics/schizophrenia

[22] ***See*** Fernandes et al, *supra* note 13

way in which the district court did not truly engage with the circumstances of this case.

E. The harm to Plaintiff from public online disclosure of her epilepsy would significantly exceed the harm to the public of not knowing Plaintiff's identity.

As noted previously, Defendant's suggestion that this Court dismiss Plaintiff's argument that the harm she would suffer from public, permanent disclosure of her epilepsy exceeds the 'harm' to the public of not knowing Plaintiff's identity (D's brief at 24) is misplaced.

Nevertheless, in Plaintiff's initial motion to proceed anonymously (DKT 2), she stated, "Plaintiff is thus making this request to prevent additional, severe professional and/or personal harm from disclosing her epilepsy by way of filing this Complaint." DKT 2 at 2-3. Thereafter, she asserted that proceeding using an alias instead of her name "[S]trikes a balance between the public's right to access judicial records…" and "an individual's well-established right to maintain the confidentiality of their medical-related information on the other." Id. at 3. Although Plaintiff was not required to have precisely described the balance between the harm she would suffer from public disclosure of her epilepsy with the 'harm' to the public of not knowing Plaintiff's specific identity to preserve that on appeal, she in fact made a substantially similar argument below.

Further, contrary to Defendant's assertion that "[P]laintiff does not specify the nature of the harm she is talking about," (D's brief at 24), Plaintiff referred to the (severe and further) harm she would suffer from publicly disclosing her epilepsy: harm similar to, or rivaling, the very harm Plaintiff seeks to redress through her Complaint, DKT 1. (P's opening brief at 21-23). Not just the loss of (further) employment opportunities given Plaintiff's circumstances, but her entire career and social status (*see*, e.g., DKT 1 ¶ ¶ 192, 213-215). Plaintiff does not merely seek monetary damages through her Complaint, but significant restorative, equitable, injunctive and declaratory relief. *See* Complaint, DKT 1 at 43-46. If forced to use her name in this case, and thereby publicly disclose her epilepsy online, Plaintiff's ability to reestablish her career as well as economic and social standing that she lost—following the disclosure of her epilepsy to Defendant—would be substantially impaired. Public disclosure of her epilepsy would indeed lead Plaintiff to suffer even further harm of the very type she seeks to redress in her Complaint.

Public disclosure of Plaintiff's epilepsy would make that information immediately available to prospective employers, and many others from potential romantic partners to landlords. Compelling such would not only frustrate the ADA's purpose, but would be a very high price for seeking justice, especially from the government. *See,* e.g., Doe v. Metro. Gov't of Nashville, No. 3:23-CV-00736,

2023 WL 6211372 (M.D.TN Sep. 25, 2023), *citing* Harrison v. Benchmark, 593 F.3d 1206 (11th Cir. 2010).

The public moreover has a stronger interest in this case being resolved on the underlying issues and in justice being rendered than the public's interest in knowing Plaintiff's identity. "The public has a substantial interest in ensuring that those who would seek justice in its courts are not scared off by the specter of destructive exposure." Doe v. MIT, 46 F.4th 61, 66 (1st Cir., 2022), *citing* Cf. Doe v. Megless, 654 F.3d 404, 410 (3rd Cir. 2011). P's Opening Brief at 23.

Contrary to Defendant's contention otherwise, Plaintiff was clear about how the harm from publicly disclosing her epilepsy through this Complaint would rival the very harm she seeks to redress through her Complaint. But the district court plainly did not assess that the nature of the relief Plaintiff seeks through her Complaint would be frustrated by public disclosure of Plaintiff's epilepsy diagnosis. In this respect, the court did not *actually* engage with and consider all the circumstances and substance of Plaintiff's Complaint (DKT 1) when denying her motion to proceed anonymously.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFF'S REQUEST TO PROCEED ANONYMOUSLY IN THE COMPLAINT BELOW NOTWITHSTANDING THE RELEVANT LEGAL STANDARDS AND ALL THE CIRCUMSTANCES OF THE COMPLAINT

Notwithstanding Defendant's contention otherwise, in denying Plaintiff permission to proceed anonymously (DKT 4 and DKT 26), the district court abused its discretion by failing to *actually* consider *all* the circumstances of the Complaint. Unravelling the anonymity EEOC afforded Plaintiff through its appellate decision, and that publicly disclosing Plaintiff's epilepsy would result in further harm similar to the harm she seeks to redress through her lawsuit, are two such examples.

Separately, the court below abused its discretion by misapplying this Court's legal standard for determining when anonymity is warranted due to stigma.

A. Contrary to Defendant's assertion, despite the district court stating it weighed *all* circumstances of the Complaint, the Magistrate Judge and district court did *not actually* do so.

In Doe v. Neverson, that district court denied that plaintiff anonymity "Upon a careful consideration of these factors, and cognizant of all the circumstances…" Doe v. Neverson, case no. 20-cv-20016-UU, at 3 (S.D.FL Jan. 16, 2020). Yet on appeal, this Court found that trial court "[F]ailed to properly consider Ms. Doe's allegations about the stigma she claimed she would face as a result of her family's religious beliefs." Doe v. Neverson, 820 F. App'x 984 (11th Cir. 2020).

Similarly, in this case, Defendant asserts the district court considered all the circumstances of the Complaint because "[T]he magistrate judge determined that the six factors were 'not exhaustive,' but that the determination is guided by a consideration of all the circumstances…" D's brief at 22 and 24, *citing* DKT 4 at 6. However, like in Doe v. Neverson, just because the district court *said* it considered all the circumstances of the case does not mean it *actually* did.

As Plaintiff described in her opening brief, the court *limited* its assessment of whether Plaintiff's privacy interests warrant anonymity to the six factors this Court set forth as *a starting point* for considering *all* the circumstances of the Complaint in determining whether anonymity is warranted. Plaintiff B. v. Francis, 631 F.3d 1310 (11th Cir. 2011). The district court abused its discretion when it failed to *actually* consider *all* the circumstances set forth in Plaintiff's Complaint (DKT 1). In this case, "[T]he district court… failed actually to exercise discretion, ruling instead on the basis of general disapproval of party anonymity…" James v. Jacobson, 6 F.3d 233, 242 (4th Cir. 1993).

i. The district court did not *actually* consider that the harm Plaintiff would suffer from publicly disclosing her epilepsy would rival the very harm she seeks to redress through her Complaint.

Plaintiff demonstrated in her Complaint (DKT 1) and motion for anonymity (DKT 2) that by publicly disclosing her epilepsy, she would suffer additional

severe harm of the very type she seeks to redress through her Complaint.

Not only did Plaintiff set forth she has repeatedly been harmed when she has disclosed her epilepsy to others (in both employment and personal settings). But, as set forth previously, the restorative, equitable, and injunctive relief Plaintiff seeks through her Complaint, and her ability to reestablish her career and professional standing that she lost following her epilepsy disclosure to Defendant, would be significantly impaired if Plaintiff were compelled to publicly disclose her epilepsy under her name for all to see. *See* DKT 1 at 31-32.

In her objection to the Magistrate Judge's denial of anonymity (DKT 5), Plaintiff also noted a secondary factor, beyond the primary issue of the confidentiality of her epilepsy: that compelling her to proceed in her name would make her more vulnerable to *further* retaliation in her (specialized) professional field—especially given that Plaintiff was already subjected to (some) retaliation of Defendant disparaging her to others in her professional field following her EEO activity. *See* DKT 1 at 27 and DKT 5 at 18.

Proceeding in her name would subject Plaintiff to more of the underlying harm she still seeks to redress following Defendant's discrimination and retaliation by bringing her Complaint to federal court—after the EEOC ruled in Plaintiff's favor on the merits but denied her nearly all restorative and equitable relief. The court did not actually weigh this factor.

ii. The district court did not actually assess the privacy the EEOC afforded Plaintiff in publishing its appellate decision.

Plaintiff made it clear the EEOC maintained her privacy by referring to her pseudonymously when publishing its appellate decision.[23] This was apparent in EEOC's appellate decision—which directly and necessarily preceded the Complaint below. *See* DKT 1 at 41. It was moreover clear in Plaintiff's request to proceed "Using the alias assigned by the EEOC." *See* DKT 2.

Despite the clear connection between Plaintiff's request to proceed pseudonymously in the district court with her pseudonymity through the litigation before the EEOC, culminating in a published appellate decision—and that compelling Plaintiff to proceed with the continuation of the Complaint in the court under her real name would unravel the privacy the EEOC extended to Plaintiff (grounded in the Privacy Act)—the court did not weigh the implications of requiring Plaintiff to continue with her Complaint publicly.[24] *See* Doe v. MIT, 46 F.4th 61, 72 (1st Cir. 2022) (*noting* whether a complaint is bound up with a prior proceeding made private pursuant to law is among the various factors courts

[23] ***Note***: The EEOC appellate decision referenced not only Plaintiff's epilepsy diagnosis but significant *additional* private information (e.g., aspects of Plaintiff's financial status, such as her Medicaid dependence and student loan debt). *See* EEOC decision at 7, DKT 1 at 47.

[24] ***See*** U.S. Equal Employment Opportunity Commission, "Open Government Plan," Version 4.0, July 2016. Available at: https://www.eeoc.gov/us-equal-employment-opportunity-commission-eeoc-open-government-plan)

should consider in weighing anonymity requests).

The court's failure to actually consider this factor is apparent from it stating, "[I]t is not clear from the record whether Becerra knows plaintiff's identity." (DKT 4 at 12, footnote 4, *referring to* Plaintiff's use of a particular pseudonym). The court then reiterated this factor in overruling Plaintiff's objection (DKT 26 at 5). This is despite that EEOC's appellate decision, attached to Plaintiff's Complaint (DKT 1 at 41), *clearly showed* Defendant could recognize Plaintiff through EEOC's decision, both from the appeal number and the decision's reference to Plaintiff by *the same* pseudonym.[25]

It is apparent that both the Magistrate Judge and district court decisions denying Plaintiff anonymity gave short shrift to the particular circumstances of the Complaint (DKT 1), including disregarding the nature of the EEOC decision preceding the Complaint. In so doing, the court further did not *actually* consider *all* the circumstances of this case.

[25] ***NOTE***: As noted in *supra* note 4, the version of the EEOC appellate decision Plaintiff attached to her Complaint (DKT 1 at 41), is the same version of the decision published to the EEOC website and legal databases. *See* Tessa G. v. HHS, EEOC Appeal no. 2020004613 (Aug. 29, 2022).

B. The district court did not apply the legal standard this Court set forth when denying Plaintiff anonymity, based on the widely-acknowledged severe stigma surrounding epilepsy.

In its brief, Defendant reiterates the court's conclusion that Plaintiff's epilepsy diagnosis is neither information of "utmost intimacy" nor sufficiently stigmatizing to warrant anonymity because "[P]laintiff points to no case law classifying a plaintiff's disclosure of epilepsy as information of the 'utmost intimacy.'" *See* DKT 26 at 4 and D's brief at 15. In denying anonymity, the district court abused its discretion by applying a different standard requiring Plaintiff to cite a prior case where a court specifically recognized epilepsy as information of "utmost intimacy"—rather than basing its determination on the actual stigma attached to epilepsy, especially where this particular question is of first impression.

As this Court noted in Doe v. Neverson:

> [T]he district court failed to consider that, in other cases, we have held that "social stigma" is sufficient to warrant proceeding anonymously. As we have explained, "[c]ourts have permitted plaintiffs to proceed anonymously in cases involving mental illness, homosexuality, and transsexuality" because "the social stigma attached to the plaintiff's disclosure was found to be enough to overcome the presumption of openness in court proceedings."

820 F. App'x 984 (11th Cir. 2020). This Court's reference to "cases involving mental illness, homosexuality…," Id, was not an *exhaustive* list of disclosures involving stigma.

Likewise, this Court's standard permitting anonymity where social stigma is attached to the disclosure does not require a plaintiff to identify a prior case finding

an identical disclosure stigmatizing. By contrast, this Court often requires plaintiffs point to a specific case establishing particular conduct violates the constitution to overcome qualified immunity. *See* Echols v. Lawton, 913 F.3d 1313, 1325 (11th Cir. 2019) (*setting forth* when a defendant's conduct "'So obviously violated the constitution... that prior case law is unnecessary'".).

Similarly, in Doe v. Neverson, this Court did not require that plaintiff point to a prior case finding the same specific circumstances and nature of the sexual assault constituted "utmost intimacy". 820 F. App'x 984 (11th Cir. 2020). That there was stigma attached to the circumstances of the disclosure was sufficient for anonymity; that the district court in Doe v. Neverson had not *actually* considered the true nature of the stigma was itself an abuse of discretion by that court. Id.

The court below in this case similarly abused its discretion by giving "short shrift" to the well-established, severe stigma attached to epilepsy. *Compare* DKT 2 at 2, with DKT 4 at 8. Thereafter, the court applied a different legal standard than this Court set forth, requiring Plaintiff to identify a prior case specifically holding epilepsy is information of "utmost intimacy". This was despite that the particular question of whether epilepsy is information of "utmost intimacy" and/or sufficiently stigmatizing to justify anonymity, is of first impression. And notwithstanding the copious persuasive legal and empirical authorities Plaintiff set forth on the extent of epilepsy stigma. *See* DKT 5.

Contrary to Defendant's contention in D's brief (at 28), it was not within "a range of choice for the district court" to deny Plaintiff anonymity after the court failed to *actually* consider *all* the circumstances of the case, gave short shrift to the epilepsy stigma at issue in this Complaint (DKT 4)—then applied a different legal standard requiring Plaintiff to have identified a prior case specifically involving epilepsy disclosure. A trial court's ruling that is based upon an error in law is freely reviewable upon appeal. Plaintiff B. v. Francis, 631 F.3d at 1315, *citing* Doe v. Stegall, 653 F.2d 180, 183 (5th Cir. Unit A Aug. 1981).

CONCLUSION

For the reasons set forth above and in Plaintiff's opening brief, Plaintiff respectfully requests that this Court vacate the district court's denial of Plaintiff's motion to proceed anonymously.

Respectfully Submitted,

/s/ [redacted] a/k/a Tessa G.

Plaintiff-Appellant, *Pro Se*

CERTFICATE OF COMPLIANCE

This brief complies with Fed. R. App. P. 32(a)(7)(B) because it contains 6,498 words, excluding the parts exempted by 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using the word processing system Microsoft Word 365, in 14-point Times New Roman font.

/s/ [redacted] a/k/a Tessa G.

Plaintiff-Appellant, *Pro Se*

CERTFICATE OF SERVICE

I hereby certify that this REPLY BRIEF OF PLAINTIFF-APPELLANT TESSA G was filed via ECF on November 25, 2024. I also served a courtesy copy of the foregoing on the Defendant via electronic mail on November 25, 2024 at Melaine.Williams@usdoj.gov.

/s/ [redacted] a/k/a Tessa G.

Plaintiff-Appellant, *Pro Se*